UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/502
22 February 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 502

Case No. 514: GISCOMBE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas at the request of Fitzgerald Giscombe, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 January, 28 February, 30 April, 31 May and 30 June 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 16 June 1989, the Applicant filed an application, containing pleas that read in part as follows:

"II. PLEAS

7. The Applicant respectfully requests the Administrative Tribunal:

Preliminary Measures

(1) To direct the Respondent, pursuant to Article 10 of its Rules, to furnish the Applicant with requisite information and documents...

Substantive Measures

...

(7) To order the Respondent, pursuant to Article 9 of its Statute:

(a) To rescind his decision of 12 September 1988, denying the Applicant's claim for compensation under Article 11.2(d) of Appendix D to Staff Rules.

(b) To direct the Advisory Board on Compensation Claims to reconsider the Applicant's claim for compensation under Article 11.2(d) of Appendix D to Staff Rules, in the light of the assessment made by Dr. Fred Montas, as aforesaid, and of the requisite documents submitted by him to the Board, and to award him appropriate compensation under Article 11.2(d) of Appendix D to Staff Rules.

(c) To award the Applicant all appropriate compensations under any other provisions of Article 11 of Appendix D to Staff Rules.

(8) To award the Applicant a sum of $3,000.00 to cover the Counsel's fees and other relevant expenses."

Whereas the Respondent filed his answer on 20 November 1989;

Whereas the Applicant filed written observations on 29 December 1989;

Whereas, on 20 September 1990, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 16 November 1990, the Tribunal decided to adjourn its consideration of the case until its next session to be held in 1991;

Whereas the facts in the case are as follows:

Fitzgerald Giscombe entered the service of the United Nations on 25 May 1965. He served in different capacities at the Office of General Services until 16 June 1976, when he was reassigned to the Paint Shop as a House Painter. On 24 April 1979, the Applicant was injured in an accident that resulted in disciplinary proceedings against another staff member. The Applicant subsequently filed a claim under Appendix D to the Staff Rules with the Advisory Board on Compensation Claims (ABCC). The ABCC recommended to the Secretary-General that "any injuries sustained by [the Applicant] in the incident of 24 April 1979 be attributed to the performance of official duties" and that "during such time as [the Applicant should be] incapacitated from the performance of official duties as a consequence thereof, his

absence [should] be charged to sick leave and/or special leave in accordance with articles 11 and 18 of Appendix D to the Staff Rules". The Secretary-General accepted the ABCC's recommendation with the proviso that such compensation should be subject to the provisions of article 6 of Appendix D.

On 14 September 1981, the Secretary-General terminated the Applicant's permanent appointment for unsatisfactory service. The Applicant contested this decision, first, before the Joint Appeals Board (JAB) and then in the Administrative Tribunal which rendered Judgement No. 356 in his case on 5 November 1985. In paragraph VI of that judgement, the Tribunal rejected, under article 7 of its Statute, "as not receivable in the present procedure", further claims of the Applicant "for compensation for injuries sustained in connection with his employment with the United Nations" under Appendix D and for a disability pension. However, taking into account a statement by the Respondent at the oral proceedings "that in view of the unfortunate circumstances" of the case he would consider the Applicant's request for empanelling a Medical Board to reconsider under article 17(a) of Appendix D the determination of the type and degree of the Applicant's disability, despite expiration of the time-limit, the Tribunal decided that the Applicant should be permitted to pursue his appeal under article 17 of Appendix D, should he so desire. (Judgement No. 356: Giscombe (1985), para. VI).

The Applicant filed a further claim with the ABCC. On 13 March 1986, the Secretary of the ABCC informed the Applicant that, in connection with his claim, the UN Medical Director requested that he undergo a "complete up-to-date orthopaedic examination" by Dr. Fred Hochberg, an orthopaedist whom the UN Medical Director had recommended. The cost of the examination would be borne by the United Nations. In a reply dated 15 April 1986, the Applicant objected to the physician recommended by the UN Medical Director, inquiring whether he cooperated regularly with the UN Medical Service and suggesting that his personal doctor and the UN Medical Director should "jointly nominate a specialist who would also be seen to be independent".

On 5 May 1986, the Secretary of the ABCC advised the Applicant that the selection of the physician had been made in accordance with article 14 of Appendix D to the Staff Rules, providing that: "The Secretary-General may require the medical examination of any person claiming or in receipt of a

compensation for injury or illness under these rules". On 9 May 1986, the Applicant informed the Secretary of the ABCC that he was making arrangements to see Dr. Hochberg but would prefer if his "procedural suggestion" to appoint a different doctor were accepted.

On 31 July 1986, Dr. Ernesto Lee, the Applicant's orthopaedic surgeon, forwarded his medical opinion on the Applicant to the UN Medical Director.

On 18 September 1986, the UN Medical Director wrote to the Secretary of the ABCC, indicating that, on the basis of Dr. Ernesto Lee's medical report, the Applicant's disability appeared "to be greater than what previous evidence has shown". He stated his belief that the UN had "insufficient information to arrive at an accurate determination" and proposed that a Medical Board, or an independent physician, be asked to provide new findings. In a reply dated 15 December 1986, the Secretary of the ABCC asked the UN Medical Director to establish a Medical Board under article 17 of Appendix D to determine the medical aspects of the claim for compensation for loss of function under article 11.3 of Appendix D.

On 22 April 1987, the then Deputy UN Medical Director, Dr. Gerede, informed the Acting Secretary of the ABCC that a Medical Board constituted by himself, representing the United Nations, Dr. Ernesto Lee, selected by the Applicant, and Dr. Fred Hochberg, who had been selected by the other two, would convene on 7 May 1987.

On 24 July 1987, the Applicant was examined by a Medical Board consisting of the then Deputy UN Medical Director, Dr. Ingrid Laux, representing the United Nations, Dr. Ernesto Lee, selected by the Applicant, and Dr. Fred Montas, selected by the other two. In its report on the Applicant, the Board stated that the purpose of the Board's meeting was "to determine the degree of Mr. Giscombe's impairment of the lower back using the Second Edition of the AMA [American Medical Association] Guides to the Evaluation of Permanent Impairment for this calculation." After setting forth the conclusions of the medical examination, the Board added:

> "Due to the fact that members of the Board noticed that Mr. Giscombe showed a noticeable difference between the (R [right]) and the (L [left]) calf, it was decided, that he should undergo CT [computer tomography] scan and possible thermography, in order to rule out any damage to the nerve roots. The results of these examinations will then be submitted to the Board."

In a letter dated 25 August 1987, to the UN Medical Director, Dr. Fred Montas set forth "additional comments concerning [the Applicant's] medical examination" and recommended that the Applicant be compensated according to a "20% functional ability, or 80% functional deficiency...". He gave as a reference Dr. E.J. Norby's work entitled Disability Evaluation of the Neck and Back (1987).

On 8 October 1987, the UN Medical Director transmitted the Medical Board report to the Acting Secretary of the ABCC, together with his statement that, based upon the Medical Board report, he had "calculated that Mr. Giscombe has an impairment of the whole person equal to 25%" and that "this degree of impairment is permanent". The UN Medical Director further stated that although the Medical Board report, in its last paragraph suggested that Mr. Giscombe should "undergo CT scan and possible thermography", it was Dr. Ingrid Laux's understanding that no additional tests had been performed. He added: "This, of course, would not result in any reduction in the above calculation which is based upon movements of various joints and the spine. Previously on 2 September I had sent you the additional report which Dr. Montas had submitted. This report uses a different method of calculating impairment and therefore should only be 'noted for the record'".

On 22 October 1987, the ABCC again considered the Applicant's claim, together with the report of the Medical Board. The ABCC recommended that the Applicant be compensated for a 25 per cent loss of function of the whole person under article 11.3 of Appendix D to the Staff Rules and be paid the amount of US$21,162.50. This recommendation was approved on behalf of the Secretary-General on 2 November 1987. On 4 November 1987, the Acting Secretary of the ABCC informed the Applicant of the decision by the Secretary-General.

In a letter dated 16 November 1987, the Applicant informed the Acting Secretary of the ABCC that he intended to request the ABCC to re-examine his claim and that he would use the money awarded to him, but with the understanding that he did not accept it as payment in full.

On 3 December 1987, the Applicant wrote to the Acting Secretary of the ABCC requesting a re-examination of his claim under article 11.2(d) of Appendix D to the Staff Rules instead of under article 11.3.

On 11 March 1988, the Acting Secretary of the ABCC informed the Applicant that his request for compensation for alleged loss of earning capacity had been discussed by the ABCC at its 316th meeting on 7 March 1987, and that the ABCC had decided to postpone a recommendation on his claim pending receipt of the Applicant's federal, state and city income tax returns from 1983 to 1987, and the results of a CT scan to be arranged by the UN Medical Service.

On 29 March 1988, a CT scan was performed on the Applicant, the results of which were sent to the UN Medical Service.

On 17 June 1988, Dr. Fred Montas wrote to the UN Deputy Medical Director commenting on the CT scan. He stated that: "The presence of a spinal stenosis can explain the patient's symptomatology but does not in itself prove a causal relationship with the low back injury. If the stenosis was pre-existing, it could be an aggravating factor to the patient's injury". He recommended that "in either case, consideration should be given to a laminectomy to open the spinal canal".

On 10 August 1988, Dr. Ernesto Lee wrote to the UN Deputy Medical Director commenting on the CT scan. He stated that: "It is my considered medical opinion that the osteoarthritis may be age related but the encroachment consistent with spinal stenosis may be traumatic".

On 13 September 1988, the Secretary of the ABCC informed the Applicant that the ABCC, at its 320th meeting held on 8 September 1988, upon re-examination of his claim for compensation under article 11.2(d) of Appendix D to the Staff Rules, had found that the Applicant was "not partially disabled as a result of the injury in a manner which adversely affected his earning capacity" and therefore recommended to the Secretary-General "that the claim for compensation under article 11.2(d) be denied".

On 16 June 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent failed to furnish the Applicant with the requisite information and documents.

2. There were gross procedural irregularities in the actions of the ABCC.

3. The UN Medical Director failed to conduct appropriate examinations on the Applicant.

4. The Respondent deliberately attempted to distort the facts in order to cover up the failure of the UN Medical Director to conduct the said examinations.

Whereas the Respondent's principal contentions are:

1. The Respondent's refusal to furnish the documents requested by the Applicant is justified since all relevant material has been produced.

2. The decision by the Secretary-General, upon the recommendation of the ABCC, to award the Applicant US$21,162.50 under article 11.3 of Appendix D to the Staff Rules was a valid exercise of discretion, taken in accordance with the prescribed procedures.

3. The decision by the Secretary-General, upon the recommendation of the ABCC, to deny the Applicant compensation under article 11.2(d) of Appendix D was a valid exercise of discretion, taken in accordance with the prescribed procedures.

The Tribunal, having deliberated from 19 October to 7 November 1990 and from 15 February to 22 February 1991, now pronounces the following judgement:

I. The Tribunal does not accept the request of the Applicant for an oral hearing as adequate material is available to come to a definite conclusion. As a preliminary measure, the Applicant asked for a number of documents, some of which should have been in his possession but were reported lost or mislaid. To the extent that the Applicant's requests have not been met already, the Tribunal considers the remaining documents sought irrelevant or unnecessary and therefore finds that they need not be produced. The Tribunal also notes that under "preliminary measure", the Applicant asked on 24 February 1989, a large number of questions of the Respondent. As some of them are of a contentious nature and do not, in the view of the Tribunal, conform to the provisions of article 7(3)(a) of the Rules of the Tribunal regarding preliminary or provisional measures, while others have been

answered directly or indirectly by the contents of the record in this case, the Tribunal does not consider that the Respondent is required to answer any further questions.

II. Under article 7 of the Statute of the Tribunal, the claim of the Applicant should first have been examined by the Joint Appeals Board (JAB), but it has been the practice of the Tribunal and of the Respondent to treat the Advisory Board on Compensation Claims (ABCC) as a joint appeals body provided for in the Staff Regulations.

III. The first four pleas of the Applicant relate to the ABCC recommendation to assess at 25 per cent the "injury or illness resulting in permanent disfigurement or permanent loss of a member or function" under article 11.3 of Appendix D to the Staff Rules. The other pleas relate to the Applicant's claim that he is entitled to benefits under article 11.2(d) of Appendix D rather than under article 11.3.

IV. This case is an outgrowth of paragraph VI of the Tribunal's Judgement No. 356, Giscombe (1985) which allowed the Applicant to pursue his request for empanelling a Medical Board under article 17(a) of Appendix D to determine the nature and extent of his injury and finally to assess the compensation to which he might be entitled.

V. The Respondent's agreement in the earlier case to waive the prescribed time-limit to enable the Applicant to make a request under article 17(a) of Appendix D was based on the ground that "something went wrong - somebody advising him (the Applicant) did not quite advise him correctly". The statement made by the Respondent in this context during the oral hearing in the earlier case did not authorize the Applicant to submit a series of claims, including the present claim under article 11.2(d) "for enhanced disability and pension benefits" as indicated in point (2) of the present plea. However, the Respondent has not raised any objections on grounds of receivability of the present claim under article 11.2(d) or on grounds of untimeliness with respect to the appeal under article 11.3.

VI. There was some doubt at an early stage in connection with the claim under article 11.3, whether an independent medical opinion should be sought under article 14 of Appendix D or whether a medical board should be constituted under article 17 thereof. In the end, a medical board consisting of Dr. Laux, the then Deputy Director of the UN Medical Service, Dr. E. Lee, selected by the Applicant, and Dr. F. Montas, the third doctor selected by Dr. Laux and Dr. Lee, met "on 24 July [1987] after it had examined Mr. Giscombe on the same day". The purpose of the meeting, according to the three doctors, "was to determine the degree of Mr. Giscombe's impairment of the lower back, using the second edition of the AMA [American Medical Association] Guides to the Evaluation of Permanent Impairment for this calculation". The report was signed by the different doctors on different dates, with the signatures being completed on 4 September 1987. The report concluded with the words that Mr. Giscombe "should undergo CT [computer tomography] scan and possible thermography, in order to rule out any damage to the nerve roots. The results of these examinations will then be submitted to the Board [ABCC]".

VII. The Tribunal notes that neither at the time when the medical report was drawn up, nor when it was subsequently signed by the three doctors, was any indication given that the injuries sustained by the Applicant were going to be considered as "resulting in disability which is determined by the Secretary-General to be partial" to which article 11.2(d) of Appendix D applied, or as "resulting in permanent disfigurement or permanent loss of a member or function" to which article 11.3 of Appendix D was applicable. However, the ABCC recommended on 22 October 1987, to the Secretary-General "that in light of the report of the Medical Board, the claimant be compensated under article 11.3 for a twenty-five (25) per cent loss of function of the whole person in the amount of $21,162.50".

VIII. The Applicant contests this recommendation of the ABCC on the ground that it was not supported by the report of the Medical Board. The Tribunal finds that the Board's determination was based on the unanimous assessment by the Medical Board of the injuries, even though the calculation was made by Dr. Irwin, the then Director of the UN Medical Service, who was not a

member of the Medical Board; Dr. Irwin was guided by the AMA standard which governed, and which was accepted by the Medical Board unanimously, in calculating at 25 per cent the injury sustained by the Applicant. Dr. Montas, the third member of the Medical Board estimated the damage to be 80 per cent by adopting a different system of calculation apparently suggested by Dr. Nordby's publication entitled Disability Evaluation of the Neck and Back.

IX. The ABCC, which had been supplied by Dr. Irwin with a copy of Dr. Montas' assessment, was thus faced with two sets of calculations, one by Dr. Irwin, based on the system accepted by all the three doctors of the Medical Board and another by Dr. Montas. Normally these developments should have been known to the Applicant through his own doctor (Dr. Lee). There is no evidence that either Dr. Lee or Dr. Montas raised any objection to the 25 per cent impairment arrived at by Dr. Irwin in applying the AMA standard to the medical observations detailed in the Medical Board report. The system applied by Dr. Irwin was on the basis of the work of the Medical Board; this has to be weighed against the individual suggestion made by Dr. Montas, on the basis of a system not adopted by the Medical Board. Dr. Lee, the claimant's own doctor, remained silent on this point.

X. Initially, the Medical Board was to consist of Dr. Lee, Dr. Laux and Dr. Hochberg. In a letter of 15 April 1986 to the Secretary of the ABCC, the Applicant suggested that instead of Dr. Hochberg, whom he thought might regularly "co-operate with the UN Medical Service", his "doctor could be in touch with the UN Medical Director, and they could jointly nominate a specialist who would also be seen to be independent". On 28 April 1987, the Acting Secretary of the ABCC wrote to the Applicant that "as requested, Dr. Gerede of the Medical Service has confirmed that your physician, Dr. Ernesto Lee, agreed to have Dr. F. Hochberg as the third physician on the Medical Board". It is unclear how Dr. Hochberg was replaced on the Medical Board by Dr. Montas on 24 July 1987, but it is obvious that the Applicant's physician must have agreed to the designation of Dr. Montas. The Applicant had emphasized the need for the third doctor on the Board being "independent", and the record shows that Dr. Montas was familiar with

the Applicant and had examined him at least once on 11 June 1987, before the Medical Board met on 24 July 1987. Dr. Montas' letter of 25 August 1987 to Dr. Irwin does not explain whether he made any further examination of the Applicant before he made his assessment by using Dr. Nordby's book. However, he signed the Medical Board report on the same date (25 August 1987) and did not mention in it his findings based on Dr. Nordby's book; nor did he refer to the Medical Board report in his letter of 25 August to Dr. Irwin. Dr. Irwin forwarded to the ABCC Dr. Montas' assessment "for the record".

XI. The Medical Board concluded its report with the words "it was decided, that he [the Applicant] should undergo CT scan and possible thermography, in order to rule out any damage to the nerve roots. The results of these examinations will then be submitted to the Board". In sending the Medical Board report to the ABCC, Dr. Irwin said, inter alia "it is Dr. Laux's understanding that no additional tests have been made". Dr. Irwin went on to explain that those tests would not have any effect on his calculation of 25 per cent impairment, which he stated had been "based upon the movements of various joints and the spine". No medical objections to Dr. Irwin's views were raised then or later. The ABCC apparently accepted Dr. Irwin's views and no further tests were made, except that the CT scan was subsequently undertaken in a different context. The thermography test was indicated as a possibility in the Medical Board Report and no one mentioned it again later.

XII. On receipt of the Secretary-General's decision of 22 October 1987, that the Applicant's impairment had been assessed at 25 per cent under article 11.3 of Appendix D to the Staff Rules and that he was awarded compensation in the amount of $21,162.50, the Applicant wrote on 3 December 1987, to the Acting Secretary, ABCC, asking that his case be "reconsidered under the provisions outlined in article 11.2(d) rather than under article 11.3". He also stated that his earning capacity "has been considerably minimized as a direct result of [his] partial disability due to service incurred accident". This was followed by a letter from Creative

Construction concluding with the words: "While he [the Applicant] was willing to work, and has the ability, he could not cope with the lifting of the materials required for the job. Therefore, once again I had to lay him off".

XIII. The ABCC reopened the case and asked the Applicant to send the results of the CT scan to be arranged by the UN Medical Service and certified copies of his federal, state and city income tax returns for the years 1983-1987. The tax returns showed that the Applicant had filed no return with the US Federal authorities for the years 1983, 1984 and 1986, but earnings figures for 1985 were supplied; nothing was said about 1987. As for the New York State Department of Taxation and Finance, a document was forwarded stating that "no record of a return being filed" was available in respect of the tax years 1984, 1985 and 1986.

XIV. The CT scan was performed on 29 March 1988. It resulted in the conclusion that there were "osteoarthritic changes at the L4-L5 level", that "there does appear to be encroachment upon the contents of the neural canal" which "apparently represents a stenotic element" and that "a herniated nucleus pulposus is not discernible". On the CT scan report, Dr. Lee, the Applicant's own doctor, gave the opinion that "the conclusion is in my opinion self-explanatory. However, it is my considered medical opinion that the osteoarthritis may be age related but the encroachment consistent with spinal stenosis may be traumatic". Dr. Montas remarked on the CT scan report: "The presence of a spinal stenosis can explain the patient's symptomatology but does not in itself prove a causal relationship with the low back injury. If the stenosis was pre-existing, it could be an aggravating factor to the patient's injury. In either case, consideration should be given to a laminectomy to open the spinal canal".

XV. About six months later, the ABCC took up the case on 8 September 1988, and reviewed the claim in the light of the latest developments. Having found "on the basis of the reports submitted that upon separation of the claimant from the United Nations service, he was not partially disabled

as a result of the injury in a manner which adversely affected his earning capacity", the ABCC recommended that the Applicant's claim for compensation under article 11.2(d) be denied.

XVI. The recommendation of the Board was partly based on the medical reports before it and partly on what had transpired in the earlier years, i.e. from 1979, when the Applicant met with the accident, until he was separated; this period has been fully covered in the Tribunal's Judgement No. 356 of 5 November 1985. The Tribunal is not competent to pronounce on medical matters and accepts the present finding of the ABCC, that upon separation, the Applicant was not "partially disabled as a result of the injury in a manner which adversely affected his earning capacity". The Applicant's separation was due to his performance and he was accorded due process.

XVII. It remains only to comment on some connected matters of which a few appear to the Tribunal to be peripheral. The Applicant's accident happened over ten years ago. Given the possibility that intervening events might have affected him, a causal relationship between the accident and the Applicant's present condition could not be established. Moreover, as is clear from some of the medical evidence, advancing age as well as the past medical history of the Applicant - difficult to sort out after this lapse of time - could have affected both his motivation and capacity to work. His lack of motivation has been referred to by Dr. Montas and his age-related condition has been mentioned by Dr. Lee.

XVIII. The Applicant has mentioned repeatedly that the laminectomy as recommended by Dr. Montas has not been performed. Dr. Montas said that "consideration" should be given to this, but apparently there was no support for it from the other doctors. After reviewing the entire medical history of this case, which has been drawn out over a lengthy period of time, the Tribunal finds that the ABCC had not ignored any important medical advice or analysis and that its recommendation was not vitiated by any serious flaws. The letter dated 15 December 1986, from the Secretary of ABCC to Dr. Irwin indicates that, at that time, the ABCC considered the Applicant's claim as

having been made under article 11.3. However, the subsequent consideration of the case by the ABCC on different dates shows that it was not limited to that article.

XIX. In conclusion, the Tribunal holds that, while the case is marked by occasional inefficient record-keeping and minor irregularities in procedure, these deficiencies have not affected the decision to a point where the Applicant's interests have been adversely affected or where the rules have been violated, far less "arbitrarily or capriciously" transgressed. In all the circumstances of this case, the compensation allowed to the Applicant under Judgement No. 356, and subsequently by the ABCC under Appendix D, is fair and adequate.

XX. In view of the foregoing, the Applicant's pleas, including his request for costs, are rejected in their entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Samar SEN
Member

Ioan VOICU
Member

New York, 22 February 1991

R. Maria Vicien-Milburn
Executive Secretary

UNITED
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Administrative Tribunal

Distr.
LIMITED

AT/DEC/503
25 February 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 503

Case No. 372: NOBLE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Jerome Ackerman, Vice-President; Mr. Ioan Voicu;

Whereas, in Judgement No. 382, delivered on 25 May 1987, the Tribunal held that:

> "(a) the Administration acted in gross derogation of the Applicant's rights under her contract of employment in its prolonged withholding of the Applicant's pay, and in the procedures it followed in making other deductions for lateness, as well as in its direction to the bank;
>
> (b) in consequence of the Administration's actions, the Tribunal awards the Applicant US$7,000.00 in damages;
>
> (c) in conformity with the principles set forth above in paras. VII through XIV, the Administration should recalculate the amount, if any, owing to it with respect to non-compensable time after July 31, 1981, for which the Applicant was paid, and after taking into account the amounts previously paid to the Applicant, promptly pay her the amounts, if any, for each pay period that should have been paid to her, plus interest at the rate of nine per cent per annum from the respective dates when she should have received payment;

(d) if the parties are unable to concur on the quantum within 90 days from the date of the Tribunal's judgement, the Tribunal will resolve any such remaining disputed issues upon request of either party;

(e) all other pleas are rejected."

Whereas, in Judgement No. 407, delivered on 13 November 1987, the Tribunal decided that the Respondent should pay "salary to the Applicant for 2 work days in accordance with [a set of guidelines set forth in the Judgement]" and also ordered the Respondent to pay the Applicant "interest as provided in para. [XX(c) of Judgement No. 382] ... from the date [the Applicant] should have received any given payment until the amount was or is paid to her". (Cf. Judgement No. 407, paras. VI and XIII)

On 6 June 1988, the Applicant wrote to the Executive Officer of the Department of Technical Co-operation for Development (DTCD) regarding payment of interest to her in the amount of US$4,302.28, on her withheld salary, in accordance with the directives in the Tribunal's judgements. She noted that her acceptance of this amount should "in no way be construed as acceptance" of any other amount to which she believed she was entitled and noted that had the Tribunal's "directives been taken into consideration ..., the amount would have been greater than the figure at which [the Respondent] arrived".

On 12 November 1988, the Applicant wrote to the Deputy to the Under-Secretary-General for Legal Affairs, Office of Legal Affairs concerning the implementation of Judgement No. 407 and further contesting the memorandum in which the Respondent had calculated her absences and late arrivals, as well as the calculation of the interest due to her in accordance with the Tribunal's judgements.

After a lengthy exchange of correspondence between the parties, in a letter dated 11 January 1989, the Applicant informed the Executive Secretary of the Tribunal that she had decided to submit to the Tribunal a request for interpretation of Judgement No. 407.

On 7 June 1989, the Applicant filed an application, containing the following pleas:

> II. APPLICANT'S PLEAS
>
> 4. Applicant requests the Tribunal, under article 12 of its Statute, to review Judgement No. 407 rendered on 13 November 1987. Specifically:
>
> (a) To interpret and clarify in an unequivocal manner, the said judgement in respect of the criteria to be applied in the computation of charges for lateness during the period 1 August 1981 to 31 May 1987, taking into account the relevant provisions of ST/AI/221.
>
> (b) To order the Respondent to use the same criteria in computing charges for lateness during the subsequent period 1 June 1987 to 31 December 1988, the date of her retirement, also taking into account the relevant provisions of ST/AI/221, and the Tribunal's view contained in paragraph X of Judgement 407, that it accepted the Administration's determination 'without prejudicing in any other proceeding, any rights the Applicant may have regarding sick or annual leave with respect to any period of time'.
>
> (c) To order the correction of arithmetical and other errors arising from Respondent's misinterpretation of Judgement No. 407.
>
> (d) To clarify and interpret paragraph XX(c) of Judgement No. 382 as it relates to Judgement No. 407, and to order Respondent to fully implement said paragraph in respect of payment of the nine per cent per annum interest which the Tribunal had ordered, on all amounts due to Applicant 'from the date she should have received any given payment until the amount was or is paid to her'.<emphasis added>"

Whereas the Respondent filed his answer on 8 January 1990;

Whereas the Applicant filed written observations on 15 May 1990;

Whereas the Applicant's principal contentions are:

1. The Respondent has failed to fully implement Judgement No. 407.

2. The Applicant is entitled to 167 days additional pay plus the nine per cent interest ordered by the Tribunal.

3. The Respondent made an error in the calculation of the nine per cent interest paid on the salary deductions and withholdings.

Whereas the Respondent's principal contentions are:

1. The method prescribed by the Tribunal to calculate the salary deductions was properly followed by the Respondent.

2. The corrections of the salary deductions questioned here, including the one for 1985, had already been submitted to and settled by the Tribunal.

3. The Respondent applied the method mandated by the Tribunal in calculating the nine per cent interest on the Applicant's salary withholdings.

The Tribunal, having deliberated from 12 February to 25 February 1991, now pronounces the following judgement:

I. To the extent that this application purports to be, as the Applicant's pleas state, a request "...under article 12 of [the Tribunal's] Statute to review Judgement No. 407 rendered on 13 November 1987...", it is irreceivable. Article 12 plainly establishes that applications under it "must be made within ... one year of the date of the Judgement." This application was not submitted until June 1989, and it is therefore untimely under article 12. Nor is there any basis for considering this

application under the provisions of article 12 dealing with clerical or arithmetical mistakes or other accidental errors, for none have been claimed to exist.

II. The Applicant's initial plea is that the Tribunal "interpret and clarify in an unequivocal manner" Judgement No. 407. Specifically, the Applicant asks the Tribunal to rule that the Administration is required to compensate her for time not worked due to the Applicant's lateness unless the length of the lateness warrants a deduction of a half day or a full day of pay in accordance with the formula described in paragraph 16 of administrative instruction ST/AI/221. This is essentially the same argument that the Applicant advanced before the Tribunal in the proceeding which led to Judgement No. 382, and it is, in substance, one of the points which the Applicant unsuccessfully sought to relitigate in the proceeding which led to Judgement No. 407. This issue was clearly and unequivocally resolved against the Applicant in Judgement No. 382. Accordingly, the Tribunal finds this request for a ruling to be frivolous and a burdensome imposition on the Tribunal. In reality, the Applicant is seeking a second time to relitigate the same issues. As the Tribunal observed in Judgement No. 497, Silveira (1990), para. XV, "attempts to re-argue issues already decided by Judgement ... and which are res judicata" are considered to be "improper" and an "abuse" of Tribunal procedures.

III. The Applicant's next plea suffers from a similar deficiency. In it, she seeks an interpretation of Judgement No. 407 that would find the Administration to have wrongfully deducted over US$6,000 from her salary in 1985. This request seeks to relitigate factual issues involved in the proceeding which led to that judgement and which could and should have been raised by the Applicant in that proceeding, if at all. It is

plainly frivolous for the Applicant to attempt to relitigate factual issues in the guise of seeking an interpretation of a Tribunal judgement. Although Judgement No. 407 sought to avoid prejudice to the Applicant's position in a possible future proceeding that might, for example, involve disciplinary action, nothing in Judgement No. 407 was intended to permit relitigation of that judgement itself.

IV. Although the Tribunal does not wish to discourage commendable zeal on the part of counsel in providing effective representation to applicants, the case load of the Tribunal is such that, in order to preserve its ability to deal as expeditiously as possible with non-frivolous applications pending before it, the Tribunal must act to deter the submission of plainly frivolous pleadings.

V. In this case, the Respondent recognizes that an application may properly request the Tribunal directly to examine an allegation that an order of the Tribunal has not been implemented correctly. Although the Applicant attempts to justify some of her pleas on the theory that Judgement No. 407 was not implemented correctly, the Tribunal considers that the Respondent's compliance with Judgement No. 407, including his calculation of interest, was reasonable and proper. As noted above, the dominant theme of the application is an improper effort to relitigate factual and legal issues involved in Judgements No. 382 or 407 or both. However, the Tribunal notes that a communication dated 28 June 1990, from the Secretary of the United Nations Joint Staff Pension Board to the Director of the Accounts Division, points out that the Pension Fund has not yet received a final report on the correct pension contributions by the Organization. The Tribunal trusts that if this report has not already been furnished, it will be furnished promptly.

VI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Roger PINTO
President

Jerome ACKERMAN
Vice-President

Ioan VOICU
Member

New York, 25 February 1991

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/504
26 February 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 504

Case No. 540: COULIBALY

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Ahmed Osman, Vice-President, presiding; Mr. Samar Sen; Mr. Ioan Voicu;

Whereas, on 10 October 1989, Adama Coulibaly, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 November 1989, the Applicant again filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 26 January 1990, the Applicant, after making the necessary corrections, filed an application, containing the following pleas:

"II - PLEAS

I have the honour to request you to assist me in the restoration of my rights.

The total amount due is as follows:

i/15 - As per the Letter of Appointment from 11 March 1986 to 10 January 1987 (ten months) for 961,000 FCFA [Francs CFA] per month:

961,000 x 10..... 9,610,000 FCFA

ii/17 - As per the Personnel Action Form No. 708-799 issued on separation on 18 August 1987 - 60 days (two months) for 961,000 FCFA:

Thus 961,000 x 2..... 1,922,000 FCFA

iii/ - Dependency allowance in respect of dependent spouse:

Thus 185,000 F CFA x 12..... 2,220,000 FCFA

iv/15 - Dependency allowance in respect of dependent children:

60,000 F CFA per month and per child

(5) Thus..... 3,600,000 FCFA

Mr. President, the Project Mali/84/005 owes to me a total of 17,352,000 FCFA, or US$ 24,062.

In addition, Mr. President, I should be grateful if you would help me to recover this remaining sum under the contract, in accordance with the terms of staff rule 104.12(b).

As to the full reimbursement of all the expenses which I have incurred in connection with various correspondence.

The authorization to approach the local authorities of UNDP who are not involved with the problem.

Finally, Mr. President, I pray you to condemn Mr. Marc SIMONOT, Chief of the Project MALI/84/005 and his accomplices for fraud, and to impose the maximum penalty provided for in the Rules of the Administrative Tribunal." (Translation by the Tribunal)

Whereas the Respondent filed his answer on 11 April 1990;

Whereas the Applicant filed written observations on 5 June 1990;

Whereas the facts in the case are as follows:

The Applicant was initially hired by the United Nations on 10 September 1985. He was offered a six-month special service agreement to work on an Underground Water Exploration Project in Bamako, Mali. Then, on 11 March 1986, the Applicant was offered a fixed-term appointment of ten months at the G-4, step 1 level as a Warehouseman on the same project. According to the salary scales then in force in Bamako, a G-4, step 1 staff member was entitled to receive an annual net salary of 961,000 Francs CFA.

According to the documents in the Applicant's personnel files, the Applicant was notified of the decision not to renew his appointment in a letter of 30 December 1986 and he was separated from service as of 10 January 1987.

The Respondent asserts that all payments due to the Applicant as of 10 January 1987, were made to him. In accordance with a revision of UN salaries, retroactive to 1986, an additional sum of money was paid to the Applicant for the period of his appointment, i.e. from 11 March 1986 to 10 January 1987.

On 14 July 1987, the Applicant wrote to the UNDP Resident Representative, claiming that he had been unfairly treated by the Chief of his project and requesting that he be paid all his entitlements in accordance with the relevant Staff Regulations and Rules.

On 15 July 1987, the Resident Representative informed the Applicant that he had received his salary and all the payments due to him in strict accordance with the Staff Rules. He noted that the Administration had authorized all these payments in view of the Applicant's family situation, although the rules permitted their retention until the conclusion of an investigation concerning the Applicant's employment.

The Applicant subsequently claimed that the salary set out in his Letter of Appointment was a monthly rather than an annual salary and also that all allowances associated with that salary were monthly rather than annual amounts.

On 19 August 1987, the Applicant asked the Secretary-General for payment of additional salary and allowances. An exchange of correspondence ensued between the Applicant and the Respondent. The Respondent maintained that the Applicant's claims were without foundation.

On 5 December 1988, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 29 August 1989. Its cc iderations, conclusions and recommendation read as follows:

"Considerations

...

26. In connection with commutation of annual leave, the Panel noted that annual leave is granted at the rate of

30 days per year, or 2.5 days per month. For the purpose of commutation, payment for a maximum of 60 days total accrued annual leave may be claimed, but only if the staff member has accummulated this number of days of annual leave. (See staff rule 105.1(a) and (c).) The appellant claims that he is owed compensation for 60 days of annual leave, yet he was employed by the Organization under a regular fixed-term contract for only 10 months. Therefore, the Panel considered that the appellant could not have accumulated more than 25 days of annual leave during his period of service. Provided that the appellant did not take any leave during his 10 month term, he would be entitled to a commutation of a total of 25 days of annual leave (10 months at 2.5 days per month), which is the amount the Respondent claims to have paid to him.

27. With regard to the appropriate salary due the appellant under the terms of his fixed-term appointment, the Panel reviewed the official table of General Service Salaries and Allowances for Bamako, Mali, and determined that the salary stated in the appellant's fixed-term contract, as subsequently adjusted to reflect the 1987 retroactive salary increase, was indeed an annual salary and was the annual salary payable to all General Service staff members in Bamako, serving at Level 4, Step 1. The Panel, therefore, did not consider as reasonable the appellant's allegation that the stated salary was really a monthly rather than an annual salary, especially in light of his previous comparable earned income. In the Panel's view, it would have been unrealistic for the appellant to reasonably anticipate a raise in annual income from 600,000F CFA [Francs CFA], which he had received under his SSA [Special Service Agreement] just prior to his fixed-term appointment, to 9,610,000F CFA per year, for performing virtually the same services for the same employer. Similarly, the Panel noted that the amounts specified for dependency allowances are stated in the official Salary Tables as annual amounts. In the Panel's view, it would be especially doubtful that a staff member having previously received an annual salary of 600,000F CFA could reasonably expect to receive dependency allowance of 5,820,000F CFA a year.

28. The Panel did consider, however, that certain failings on the part of the Administration made it possible for the appellant to feel justified in filing the present appeal, an appeal which the Panel felt, could have been otherwise avoided.

29. In this connection, the Panel noted first that prior to his fixed-term appointment, the appellant served on an SSA for a period of six months. That SSA provided that the appellant would be paid a salary of 50,000F CFA for the work performed; however, it failed to specify whether that represented payment for the full term of six months, or whether it was to be paid per month. The Panel, taking into account the general salary level of General Service staff in Bamako, concluded that such payment would have had to be on a monthly basis. By contrast, the Panel noted that the appellant's subsequent fixed-term contract also specified a sum, namely 961,000F CFA, without specifying whether this was to be paid on an annual basis or a monthly basis, except for reference to the Staff Regulations and Staff Rules. Moreover, the Panel noted that the said fixed-term appointment was not signed and conveyed to the appellant until after his period of service had expired. The Panel observed that during the term of service when the appellant was presumably paid salary and benefits on the basis of an annual salary of 960,000F CFA, he registered no objection to the sums remitted. The Panel had no doubt but that if the appellant truly felt entitled to a salary twelve times higher than the one he was receiving — if his salary was so out of scale with what others similarly situated at Bamako were receiving or so out of line with salaries for comparable work at Bamako — the appellant would have complained after his first salary payment. For this reason also, the Panel could not credit appellant's contention that he was paid improperly during his period of service. During his ten months of service, the appellant raised no objection to his pay, or lack thereof, until after his post facto contract was given to him. The Panel was convinced that the less than accurate drafting of both the SSA and the fixed-term contract, complied [sic] with the post facto signing and delivery of the latter, were directly responsible for the filing of the present appeal.

30. While the Panel could find no basis for sustaining the present appeal, it was convinced that the time and effort wasted by the Organization in the consideration of this matter was directly attributable to administrative error in the drafting and late signing of the appellant's SSA and fixed-term contract.

Conclusions and Recommendation

31. In view of the foregoing, the Panel concludes that the Appellant was appropriately compensated for his service to the Organization and makes no recommendation in support of this appeal.".

On 12 September 1989, the Acting Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Board's report and advised him that: "The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the contested decision and to take no further action on your case."

On 26 January 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's letter of appointment provides a monthly rather than annual salary of 961,000 Francs CFA, which when multiplied by ten months as per the fixed-term contract, results in a claim of 9,610,000 Francs CFA for salary owed.

2. The Applicant is entitled under staff rule 109.8 to compensation for sixty days annual leave, resulting in a claim for 1,922,000 Francs CFA.

3. Dependents' benefits due and owing are in the amount of 2,220,000 Francs CFA for the Applicant's wife and 3,600,000 Francs CFA for his children.

Whereas the Respondent's principal contention is:

The application is without foundation as the Applicant received his full entitlements in accordance with the Staff Regulations and Rules.

The Tribunal, having deliberated from 14 February to 26 February 1991, now pronounces the following judgement:

I. The Applicant claims ten times the salary and emoluments that were actually paid to him by the Administration because his Letter of Appointment, which was for a ten-month period, provided for a salary of "961,000 Francs CFA", without specifying whether it was a monthly salary or an annual salary. The Applicant alleges on that basis that it was a monthly salary and also seeks payment for 60 days leave.

II. The Tribunal cannot concur with the Applicant's contention. In accordance with the official General Service Salary and Allowances Scale for Bamako, Mali, the salary stated in the Applicant's fixed-term appointment, as subsequently adjusted to reflect a 1987 retroactive salary increase, was an annual salary, payable to all General Service staff members in Bamako, serving at level 4, step 1. Therefore, the Tribunal finds unjustifiable the Applicant's allegations that the stated salary was a monthly rather than an annual salary, especially in the light of his previous comparable earned income.

III. The Tribunal notes that just prior to his fixed-term appointment, the Applicant had received, under a Special Service Agreement (SSA), a monthly income of 50,000 Francs CFA for a period of six months. In the Tribunal's view, it would have been quite unrealistic for the Applicant to anticipate an increase in his income for a period of six months, from 300,000 Francs CFA to 9,610,000 Francs CFA per year, for performing virtually the same services for the same employer in the same duty station.

IV. Furthermore, the Tribunal observes that irrespective of the relevant figures concerning the entitlements due to the Applicant, the general rules that govern the establishment of such entitlements cannot be ignored. The expression "Traitement soumis à retenue" or "Assessable Salary", which appears in the standard letters of appointment, cannot be interpreted arbitrarily but must be read in the light of all the provisions contained therein. The letters of appointment specify that the salary is payable in accordance with the salary scale set out in the Staff Regulations and Rules. Paragraph 7 of Annex I to the Staff Regulations provides that the Secretary-General fixes salary scales for locally recruited General Service staff. The Secretary-General promulgated salary scales for Mali, for the General Service Category, and the level of emoluments established for level 4, step 1 is the rate actually paid to the Applicant, i.e. 961,000 Francs CFA per annum. That figure appears on the Applicant's Letter of Appointment. The Tribunal notes that in accordance with a 1987 salary

revision, the Applicant's salary had been adjusted with retroactive effect to March 1986, to 1,011,000 Francs CFA net per year. That figure appears in Revision 12, dated March 1987, of the official Salary Tables for Bamako, with the clear specification that it refers to annual salaries and allowances.

V. The Tribunal finds, therefore, that the Applicant was paid salary, emoluments and benefits in accordance with the Staff Regulations and Rules and his Letter of Appointment.

VI. At the same time, the Tribunal notes that during his ten months of service, the Applicant raised no objection to his pay. It was only when the Applicant signed his Letter of Appointment, at the expiration of his term of appointment, that he questioned the level of his emoluments.

VII. The Applicant makes an additional claim to dependency benefits for his wife and children, amounting to 5,820,000 Francs CFA a year, which exceeds the amounts due to him under the pertinent rules. The Tribunal finds such a contention unjustified, for the Applicant could be paid dependency benefits only at the rates set out in the Staff Regulations and Rules and could be entitled to no greater sums.

VIII. Moreover, the Applicant seeks payment for 60 days annual leave. The Tribunal notes that annual leave is granted at the rate of 30 days per year, or 2.5 days per month. Staff rule 109.8 entitles the Applicant only to leave actually accrued and does not entitle him to an automatic payment for the 60 working days referred to in the Staff Rules as the maximum number of days that can be commuted. Staff rule 109.8 states that: "If, upon separation from service, a staff member has accrued annual leave, the staff member shall be paid a sum of money in commutation of the period of such accrued leave up to a maximum of 60 working days". In the present case, provided that the Applicant did not take any leave during his ten-month term, he is entitled to be paid for a total of 25 days annual leave, which is the amount the Respondent claims to have paid to him.

IX. The Tribunal accordingly holds that the Applicant was appropriately compensated for his service to the Organization in accordance with the Staff Regulations and Rules and his Letter of Appointment.

X. The Tribunal considers, however, that a more accurate drafting of both the SSA and the fixed-term contract mentioned above, or a parallel document stating clearly the basis - monthly or annual - of the payments which were to be made to the Applicant, would have helped to avoid the confusion or misunderstanding which has led to the present case.

XI. In addition, for reasons not explained, the fixed-term appointment for the period 11 March 1986 - 7 January 1987, was conveyed to the Applicant and was signed by him only on 28 February 1987, after his term of service had expired. The post facto signing of the Letter of Appointment was the result of administrative negligence and should have been avoided.

XII. The Tribunal considers that the Administration should ensure that procedures concerning fixed-term appointments should, in the future, be strictly observed.

XIII. Despite these administrative shortcomings, the Tribunal holds that the Applicant has not suffered any injury and therefore rejects the application in its entirety.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Samar SEN
Member

Ioan VOICU
Member

New York, 26 February 1991

R. Maria VICIEN-MILBURN
Executive Secretary